

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35404

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 483
	)	
Plaintiff-Respondent,	)	Filed: June 1, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
DANIEL LUTE,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Order denying motion for correction or reduction of sentence, affirmed.

Daniel Lute, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

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GUTIERREZ, Judge

Daniel Lute appeals from the district court's order denying his motion for correction or reduction of sentence pursuant to Idaho Criminal Rule 35. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

On May 6, 1993, an Ada County grand jury indicted Lute, charging him with battery with the intent to commit a serious felony, rape and/or kidnapping. Pursuant to an Idaho Criminal Rule 11 plea agreement, Lute stipulated to plead guilty to an amended indictment, which eliminated the reference to rape and charged him with battery with the intent to commit a serious felony to wit, kidnapping, I.C. §§ 18-903, 18-911. Additionally, the state agreed to recommend a five-year determinate sentence to run concurrently with the life sentence Lute was then serving in a separate case. The district court accepted the Rule 11 plea agreement and imposed the five-

year sentence, but failed to specify the underlying felony in the judgment of conviction filed August 17, 1993. Lute did not file a direct appeal and subsequently served out his sentence.

Fourteen years later, in August 2007, Lute filed a motion for correction or reduction of sentence, specifically requesting his judgment specify that his crime was “not a sex crime.” Without disturbing the sentence, the district court granted Lute’s motion and amended the judgment of conviction to read, “battery with intent to commit a serious felony, to-wit; kidnapping.” In January 2008, Lute filed a second motion for correction or reduction of sentence alleging the sentence was not valid because the crime he pled guilty to was not proscribed in Idaho Code. Lute further argued that the district court lacked both subject matter and personal jurisdiction over him because the grand jury’s term had expired before it indicted him in May of 1993. While the state acknowledged the grand jury’s indictment was defective, it argued the defect was not jurisdictional and that Lute’s guilty plea waived any error claim stemming from the grand jury process. The district court denied Lute’s motion, and this appeal followed.

## II.

### ANALYSIS

Lute argues the district court erred in denying his Rule 35 motion for sentence correction because the sentence included an “offense which is not proscribed by Idaho Code.”

Rule 35 specifies that a motion for reduction of a sentence, other than one for correction of an illegal sentence, must be filed within 120 days following the judgment of conviction. While the court may at any time correct an illegal sentence, the court has the power to otherwise modify a sentence for only 120 days after the filing of a judgment of conviction. This time limit is a jurisdictional limitation on the power of the sentencing court. *State v. Starry*, 130 Idaho 834, 835, 948 P.2d 1133, 1134 (Ct. App. 1997); *State v. Porath*, 113 Idaho 974, 975, 751 P.2d 670, 671 (Ct. App. 1988); *State v. Sutton*, 113 Idaho 832, 833, 748 P.2d 416, 417 (Ct. App. 1987). Further, Rule 35 has a narrow scope which “allows a trial court to correct an illegal sentence or to correct a sentence imposed in an illegal manner.” *State v. Farwell*, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007). Rule 35 does not allow for the consideration of the conviction underlying a sentence and cannot be used as a means to attack convictions. *Housley v. State*, 119 Idaho 885, 889, 811 P.2d 495, 499 (Ct. App. 1991). The defendant in *Housley* attempted to use a Rule 35 motion to argue that if his conviction was illegal, his sentence must also be illegal, and that he must be allowed to attack his conviction in order to correct his sentence. *Id.* The court

determined that there were other mechanisms, such as an appeal or action for post-conviction relief, which could be used to set aside wrongful convictions and then re-emphasized the fact that a Rule 35 motion “subjects only the sentence to re-examination.” *Id.*

Lute filed two Rule 35 motions for correction or reduction of sentence. The first motion sought correction of a clerical error discovered in the Idaho Department of Corrections’ records which provided Lute was serving a sentence for “battery with intent to commit a serious felony to-wit: rape and/or kidnapping.” The district court granted this motion and issued an amended judgment to reflect the crime to which Lute pled guilty, “battery with the intent to commit a serious felony, to-wit, kidnapping.” Lute’s second Rule 35 motion also sought correction of an illegal sentence, but appears to argue instead that defects with the underlying conviction prevented the court from imposing a legal sentence. Specifically, Lute’s motion alleges the district court lacked authority to enter the judgment of conviction against him because the grand jury’s term expired prior to indicting him and requests the court “set aside the judgment of conviction and sentence.” Lute’s supporting brief likewise failed to allege any basis for a determination that the sentence was illegal; rather, it requested relief because “a defendant cannot be sentenced for an ‘offense’ which is not proscribed by Idaho Code.” As with the defendant in *Housley*, Lute is not allowed to attack the conviction underlying his sentence through a Rule 35 motion.

Although this Court finds the Rule 35 issue dispositive, we will briefly address Lute’s argument that the grand jury’s expired term rendered his indictment invalid, and thus eliminated the court’s subject matter jurisdiction. The state concedes the grand jury process in Lute’s case was defective, but maintains the district court did not lose jurisdiction.

Even assuming the original indictment was faulty, Lute cannot now challenge it because he agreed and pled guilty to an amended indictment, thereby “admit[ing] all essential allegations including jurisdictional facts.” *State v. Byington*, 135 Idaho 621, 623, 21 P.3d 943, 945 (Ct. App. 2001). Further, Lute’s guilty plea “waive[d] all nonjurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings.” *State v. Tipton*, 99 Idaho 670, 673, 587 P.2d 305, 308 (1978). Accordingly, Lute cannot now challenge either the court’s jurisdiction or the conviction underlying his sentence.

### **III.**

### **CONCLUSION**

For the foregoing reasons, the district court's order denying Lute's motion for correction or reduction of sentence is affirmed.

Judge PERRY and Judge GRATTON **CONCUR.**